STATE BAR OF ARIZONA

MEMORANDUM

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To: Ethical Rules Work Group of the Arizona Supreme Court Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law

From: Patricia A. Sallen

Date: 8/15/2014

RE: Issues for potential consideration; follow up from July 30, 2014, work group meeting

Administrative Order 2014-66 directed the Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law to determine if rule changes need to be made in light of changes proposed by the ABA Commission on Ethics 20/20; the "changing nature of legal practice in a technologically-enabled and connected workplace"; and the growing trend of multistate and international law practice. In its introductory paragraph, the order also specifically noted that lawyers have expanded their practices beyond traditional geographical boundaries; the regulatory model based on a lawyer's physical location should be reviewed; and rules governing conflicts of interest should be reviewed and, if necessary, clarified.

To help this work group determine the issues it wishes to address, I have analyzed the issues the ABA Commission on Ethics 20/20 ("ABA Commission) either rejected or chose not to pursue as rule or comment changes. As a reminder, most of the Model Rule changes made by the ABA Commission are included in the State Bar of Arizona's pending rule-change petition.[1] Please consult the chart I previously prepared showing the comparisons.

I also have added a list of other topics this work group may wish to consider pursuing. The work group may decide that some of the issues are beyond its charge.

[1]The State Bar's petition is on the Court's Rules Forum at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/11219504491571.pdf. As of August 14, 2014, no comments had been filed in response to the petition.

To streamline this memo, I have provided hyperlinks for all exhibits, as they are all available online. This is particularly important for the ABA documents, because I have been advised that we would need copyright permission for any documents we plan to print or disseminate but hyperlinking to documents available on the ABA's public website is fine.

1. Major ethics-related topics the ABA Commission either rejected or otherwise did not pursue as rule or comment changes.

a. Alternative law practice structures, including non-lawyer ownership of law firms. The ABA Commission entertained proposals for allowing non-lawyer ownership (ranging from allowing publicly traded firms to nonlawyer investment or ownership of firms) as well as allowing multidisciplinary practice (*e.g*. law firms offering both legal and non-legal services separately, but in a single entity). It released for comment a proposal similar to -- but more restrictive than -- the structure currently permitted by the District of Columbia, which is the only U.S. jurisdiction that permits a form of nonlawyer ownership. Nonlawyer ownership, however, is becoming more common in foreign jurisdictions, notably Australia, Canada, England and Wales The *ABA Journal* described this issue as important because "American law firms doing business overseas are in a quandary over how to balance the more permissive rules on business structures in other countries and the more restrictive regulations in U.S. jurisdictions."[2] In a comment filed with the ABA Commission, the State Bar Board of Governors asked it not to do anything that would open the door to multidisciplinary practice.[3]

After taking comment, the ABA Commission decided not to propose changes to ABA policy prohibiting nonlawyer ownership of law firms.[4] It did,

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[2] The December 1, 2013, *ABA Journal* article is at http://www.abajournal.com/magazine/article/aba_ethics_opinion_sparks_renewed_debate_over_nonlawyer_ownership_of_law_fi/.

[3] The State Bar's March 12, 2012, letter is available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/statebarofarizona_alpsdiscussiondraft.authcheckdam.pdf.

[4] An April 16, 2012, news release explaining this decision is at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf.

however, ask the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee") to consider issuing an opinion about sharing fees with lawyers or law firms who may practice in a jurisdiction that allows lawyers to share fees with nonlawyers. The ABA Ethics Committee eventually issued ABA Formal Op. 464 (August 19, 2013), which concluded that a lawyer or law firm does not violate MR 5.4(a) simply because a nonlawyer could ultimately receive some portion of the fee as permitted by the other jurisdiction's law.

While the ABA Committee chose not to pursue nonlawyer ownership, the voluntary Canadian Bar Association, which has more than 37,000 members, has just released a report recommending nonlawyer ownership as well as other significant changes to the legal profession. [5]

b. Choice of law in cross-border practice. Model Rule 8.5 includes a provision that a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur. (ER 8.5 tracks this language.) As a way to provide certainty in lawyer-client business relationships, the ABA Commission released an initial proposal to add a comment to MR 1.7 that would allow lawyers and clients to agree that their relationship would be governed by the conflict rules of a specific U.S. or foreign jurisdiction. Those rules might be ones other than would have resulted under MR 8.5.

In the end, however, the ABA Commission rejected allowing lawyers and clients to choose their preferred conflicts rule. Instead, it only approved changing the comment to MR 8.5 to provide that an agreement between the lawyer and client may be considered in determining a lawyer's reasonable belief as to the predominant effect of the lawyer's conduct. The ABA House of Delegates approved this change. The ABA Commission also asked the ABA Ethics Committee to consider issuing an opinion explaining or interpreting the term "predominant effect"

[5] The Canadian Bar Association's full report and executive summary are at http://www.cbafutures.org/.

and giving more guidance about how to resolve jurisdictions'' inconsistencies about conflicts.

The ABA Commission also did not pursue suggestions for adopting a European-style conflict regime, under which lawyers could take adverse action against existing clients in unrelated matters without client consent. The State Bar joined many other individuals and entities opposing such a major change.[6]

c. Ranking and rating lawyers and law firms. Then-ABA President Carolyn Lamm, who appointed the ABA Commission, asked it to look at the ethical implications of lawyer and law firm rankings and ratings. After taking extensive testimony and spending what seemed to be a great deal of time discussing the issue, the ABA Commission concluded that MR 7.1 and MR 1.6 sufficiently guide lawyers who participate with entities that rate and rank lawyers and law firms but asked the ABA Ethics Committee, however, to consider whether formal ethics opinions might help lawyers apply the rules. It further concluded that the ABA "need not, at this time, undertake, support or contribute further resources to the study of this subject."[7]

d. Virtual law practice: A lawyer generally must be licensed in a jurisdiction if the lawyer has an office or "systematic and continuous presence" there, unless an exception applies. The comment to MR 5.5 states that a lawyer's presence may be systematic and continuous "even if the lawyer is not physically present" in the jurisdiction, but provides little guidance about what this means. The ABA Commission initially circulated a proposal that would have added a general comment about virtual practice:

> For example, a lawyer may direct electronic or other forms of communication to potential clients in this jurisdiction and consequently establish a substantial practice representing clients

[6] The State Bar's December 2, 2011, letter is available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/statebarofarizona_initialproposalonrule1_7choiceoflawandconflictsofinterest.authcheckdam.pdf.

[7] A lengthy explanation filed in August 2011 about the ABA Commission's decision on this subject is at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rankings_2011_hod_annual_meeting_informational_report.authcheckdam.pdf.

> in this jurisdiction, but without a physical presence here. At some point, such a virtual presence in this jurisdiction may become system and continuous within the meaning of Rule 5.5(b)(1).

In the end, the ABA Commission opted not to suggest any rule or comment changes, but asked the ABA Ethics Committee for "[m]ore clarity regarding the limits of a lawyer's multijurisdictional practice authority" under MR 5.5(c)(4).[8] That rule, which is the same as ER 5.5(c)(4), provides that a lawyer may on a temporary basis provide legal services in a jurisdiction in which the lawyer is not licensed if the services "are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Paragraphs (c)(2) and (c)(3), in general, allow lawyers to provide legal services on a temporary basis if they are related to a pending or potential proceeding before a tribunal or are related to alternative dispute resolution proceedings.

Arizona did not adopt the MR 5.5 comments. The ABA Ethics Committee has not issued an opinion on this topic.

e. Other technology-related issues: The ABA Commission also asked the ABA Ethics Committee to provide guidance on other technology-related issues, including lawyers using social media to conduct investigations; the meaning of MR 7.1's prohibition against "false and misleading" communications; the ethics of online social or professional networking between lawyers and judges; the meaning of a legal fee as applied to new forms of online marketing arrangements; and when client consent is needed to engage in outsourcing.[9] As a result, in addition to Op. 464 described above, the ABA Ethics Committee has issued Formal Op. 466, addressing reviewing jurors' Internet presence (April 24, 2014), and Formal Op. 465 addressing using deal-of-the-day marketing programs (October 21, 2013).

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[8] The ABA Commission's December 28, 2011, summary of actions is available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111228_summary_of_ethics_20_20_commission_actions_december_2011_final.authcheckdam.pdf

[9] *Id*.

f. Alternative litigation financing. Rather than proposing rule or comment changes, the ABA Commission opted to prepare a white paper offering "guidance on conflicts of interest resulting from the lawyer's involvement in a funding transaction; obligations relating to the duty of confidentiality and the attorney-client privilege; competence in advising clients with respect to alternative litigation finance; and rules regulating the exercise of the lawyer's independent judgment."[10]

2. Other issues for potential consideration

a. Imputed conflicts issue #1: With the proliferation of multistate and international law firms – and law-firm outposts that may never talk to each other or share information -- is it still reasonable to impute conflicts to all lawyers in the firm under ER 1.10(a)?

b. Imputed conflicts issue #2: When a lawyer leaves a firm, ER 1.10(b) allows the firm to represent a client with interests materially adverse to those of a client represented by the formerly associated lawyer, as long as the matter is not the same or substantially related to that in which the formerly associated lawyer represented the client while at the firm and no lawyer still at the firm "has information protected by ERs 1.6 and 1.9(c) that is material to the matter." How does this last provision work in this age when law firms keep digital copies of file perhaps for years or has documents as part of backup files?

c. Of counsel: Lawyers and law firms may designate a relationship as "of counsel" only if the relationship is close, regular, and personal. ABA Formal Op. 90-357 (May 10, 1990). Because of such a requirement, lawyers and law firms who are "of counsel" share conflicts. For fee-sharing purposes under ER 1.5(e), however, they are treated as separate firms. Is this still a practical distinction in a changing legal profession?

[10] *Id*. The white paper, filed with the ABA House of Delegates in February 2012, is available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf

d. Conflicts in general: Limited-scope representation is allowed and encouraged to provide access to consumers who might not otherwise able to able afford a lawyer. Taking on one small limited-scope representation may preclude a lawyer, however, from taking on more lucrative clients in the future. Should private law firms be allowed to resolve current conflicts by erecting screens?

e. Cloud computing: Lawyers typically have total control over paper files. With most cloud computing, a third party owns or otherwise controls servers or server space. How do lawyers protect client information? Must they get client consent before transferring client information to the cloud?

f. Unauthorized practice of law and virtual practice: ER 5.5(b)(1) provides that a lawyer who is not admitted in this state shall not establish an office or continuous presence "for the practice of law." What about lawyers who establish a physical presence in this state to practice the law of another jurisdiction?

g. Medical marijuana: The increase in lawyer mobility and the diversification of lawyer business interests may make this issue appropriate for this committee. Arizona and other jurisdictions have issued ethics opinions about lawyers helping clients with medical marijuana as allowed under state law. A few jurisdictions that authorize medical marijuana also have added comments to their versions of ER 1.2 clarifying that lawyers may advise on a topic that is technically against federal law.

h. ER 3.4: Criminal defense counsel may receive or discover high-tech equipment -- such as cellphones and computers -- that must be turned over to the prosecution. Is the mechanism outlined in *Hitch v. Pima County Superior Court,* 146 Ariz. 588, 708 P.2d 72 (1985), still viable?